Editor's note: Reconsideration denied by order dated Oct. 6, 1980

ESTATE OF BENJAMIN A. WRIGHT

IBLA 76-24 Decided December 23, 1975

Appeal from decision of Alaska State Office, Bureau of Land Management, rejecting Native allotment application AA-7894.

Affirmed.

1. Alaska: Native Allotments

   Native allotment applications for lands in the Tongass National Forest may be allowed only if (1) the application is founded on occupancy prior to the inclusion of the lands within the forest or, (2) an authorized officer of the Department of Agriculture certifies that the land in the application is chiefly valuable for agricultural or grazing purposes.

2. Alaska: Native Allotments

   A Native who has applied for an allotment within a national forest must show that he personally complied with the law in establishing occupancy and use prior to the effective date of the forest withdrawal and he may not tack on his parents' or grandparents' use and occupancy to establish a right in himself commencing prior to the creation of the forest.

APPEARANCES: Richard Svobodny, Esq., Donald E. Clocksin, Esq., Alaska Legal Services Corporation, Juneau, Alaska, for appellant.

OPINION BY ADMINISTRATIVE JUDGE GOSS

Donald E. Clocksin, Esquire, on behalf of the Estate of Benjamin A. Wright, appeals from a decision of the Alaska State Office, Bureau of Land Management, rejecting Native allotment application AA-7894, filed pursuant to the Act of May 17, 1906, as amended, 43 U.S.C. § 270-1 through 270-3 (1970), 1/ for lands within the Tongass National Forest. Wright's application states that the land was used by himself and his ancestors for fishing, hunting, trapping, berrypicking and woodcutting since time immemorial. The basis for the State Office rejection was that the application was not founded on personal occupancy prior to inclusion of the lands within the forest, nor was the land certified by the Forest Service as chiefly valuable for agricultural or grazing purposes.

Appellant moves to incorporate the statement of reasons filed in the case of Deborah Dalton, IBLA 75-78. He states that in the present case the issues are identical and the factual circumstances substantially similar to those in the Dalton case. We grant this motion.

[1] The Dalton case was decided by the Board in Louis P. Simpson, 20 IBLA 387 (1975). That decision, in affirming rejection of Native allotments within the Tongass National Forest, cited 43 CFR 2561.0-8(c):

> Allotments may be made in national forests if founded on occupancy of the land prior to the establishment of the particular forest or if an authorized officer of the Department of Agriculture certifies that the land in the application for allotment is chiefly valuable for agricultural or grazing purposes.

According to the Bureau of Indian Affairs Native Allotment list, Benjamin Wright was born on January 7, 1949. The lands applied for were withdrawn by Presidential Proclamation on February 16, 1909. Forty years before Wright's birth the withdrawal segregated the lands from appropriation under the public land laws, including settlement under the Native Allotment Act.

1/ The Allotment Act was repealed by section 18 of the Alaska Native Claims Settlement Act of December 18, 1971, 43 U.S.C. § 1617 (Supp. III, 1974), subject to processing of pending applications.

He did not use and occupy the land prior to creation of the Forest. Further, a letter to the State Director from the Forest Service, Department of Agriculture, June 4, 1974, states that the land is not chiefly valuable for agricultural or grazing purposes. Therefore, Wright was not entitled to an allotment under this regulation.

[2] The Board further held in Simpson, supra, that a Native who applied for an allotment must show he personally complied with the law in establishing occupancy and use prior to the effective date of the Forest Service withdrawal, and he may not tack on his parents' or grandparents' use and occupancy to establish a right in himself commencing prior to the establishment of the Forest. These principles were reaffirmed in Mary Y. Paul, 21 IBLA 223 (1975).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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Joseph W. Goss
Administrative Judge

We concur:

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Joan B. Thompson
Administrative Judge

ADMINISTRATIVE JUDGE FISHMAN CONCURRING:

I generally agree with the holdings of the main decision on the basis of the present record, but I am concerned about the absence of data to support the finding of the Forest Service that the land is "not chiefly valuable for agriculture or grazing." 43 U.S.C. § 270-2 (1970), 43 CFR 2561.0-8(c). This finding is embodied in a letter of June 4, 1974, to the BLM State Director from the Forest Service. That letter recites that "[f]ield examinations were made of the areas covered by the following Alaska Native Allotment applications * * *." It then lists 41 applications, including the one at issue and states: "The examining Forest Officers have determined that the areas applied for are not chiefly valuable for agriculture or grazing."

I recognize that we are bound by the determination of the Forest Service in this regard. See Lorinda L. Hulsman, 13 IBLA 178 (1973); Beverly Sharon Letchworth, 12 IBLA 344 (1973). We have so held with respect to Native allotment applications in National Forests. Mary Y. Paul et al., 21 IBLA 228 (1975); Louis P. Simpson et al., 20 IBLA 387 (1975).

I fully appreciate that the Department of Agriculture is the proper forum to question the classification of the lands as non-agricultural and non-grazing. Nonetheless, I believe appellant is entitled to a delineation of the facts, if any, upon which the Forest Service determination is predicated. This accords with common fairness, and indeed, with judicial standards for review of administrative decisions. See B. & O. R. Co. v. Aberdeen R. R. Co., 393 U.S. 87, 91-92 (1968).

Frederick Fishman
Administrative Judge